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No. 410

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

AMERICAN AIRLINES, INC., *Petitioner,*

v.

NORTH AMERICAN AIRLINES, INC., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE
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DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the District of Columbia Circuit which reversed an order entered by the Civil Aeronautics Board.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 411-435) is printed in the Appendix hereto. It is not yet reported. The opinion of the Civil Aeronautics Board, together with those findings of its Examiner as were specifically adopted by the Board, appears at pages 199-229 of the Record herein. The full Initial Decision of the Examiner is reported at pages 183-199 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1955 (R. 411). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Section 411 of the Civil Aeronautics Act (49 U.S.C. § 491) is adapted from Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) and is designed to prevent "unfair or deceptive practices or unfair methods of competition in air transportation." The Act empowers the Civil Aeronautics Board, either on complaint of an air carrier or on its own initiative, to institute a proceeding "if it considers that such action by it would be in the interest of the public" and, after notice and hearing, to order an air carrier to cease and desist from continuing any violation found by the Board.

From 1920 to 1930 Section 5 of the Trade Commission Act was seriously crippled by rulings and dicta in opinions of this Court to the effect that unfair methods of competition require a showing of fraud, deception of consumers by palming off, and injury to a competitor. Such views, however, were subsequently repudiated by Congress and this Court.

In a Section 411 proceeding before the Civil Aeronautics Board where the air carrier requests an order to prevent a competitor from continuing to advertise and use a recently adopted name confusingly similar to the name of the complainant carrier previously long established and extensively advertised, and where a cease and desist is entered on the basis of the findings of fact revealing that the similarity of names causes

the public widespread and serious confusion and inconvenience through checking in with the wrong carrier, attempting to purchase transportation from the wrong carrier, seeking baggage from the wrong carrier, meeting flights of the wrong carrier, and otherwise:

1. Is Section 411 to be seriously crippled by a judicial gloss—identical with the early but now repudiated views of Section 5 of the Trade Commission Act—holding that the cease and desist order eliminating the public confusion must be reversed on the ground that there can be no unfair or deceptive practice and no unfair method of competition unless there is a showing of fraudulent intent to deceive, “palming off” by deception, and injury to a competitor?
2. Does any vitality remain in the rule announced in *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), to the effect that “public interest” is an issue subject to judicial review under Section 5 of the Federal Trade Commission Act, and if so, to what extent, if any, does the *Klesner* rule have application in a Section 411 proceeding before the Civil Aeronautics Board whose jurisdiction, unlike the Federal Trade Commission’s extends over a specific segment of the national economy in which the Board is truly a specialist in determining the public interest?

STATUTE INVOLVED

Section 411 of the Civil Aeronautics Act, 52 Stat. 103 (1938), as amended 66 Stat. 628 (1952), 49 U.S.C. § 491, reads as follows:

“The [Civil Aeronautics] Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or

ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

While there are considerable differences in form, it will be noted that there is a close substantive similarity between the foregoing section and Section 5 of the Federal Trade Commission Act, pertinent excerpts from which are printed in the margin.* A notable

* "Sec. 5. (a) Unfair methods of competition in commerce; and unfair or deceptive acts or practices in commerce, are declared unlawful

* * *

"The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue . . . a complaint stating its charges If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing . . . and shall issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." 38 Stat. 719 (1914), as amended, 52 Stat. 111 (1938), 52 Stat. 1028 (1938), 64 Stat. 21 (1950), 66 Stat. 632 (1952), 15 U.S.C. § 45.

difference between the two is that the Civil Aeronautics Act, unlike the Trade Commission Act, empowers the Civil Aeronautics Board to proceed upon a complaint by an air carrier as well as upon its own initiative.

STATEMENT

This is the first case in court involving the interpretation and application of Section 411 of the Civil Aeronautics Act.

The petitioner, American Airlines, Inc., is engaged in air transportation pursuant to certificates of public convenience and necessity under the Civil Aeronautics Act (R. 220).^{*} In 1934 it was incorporated under its present name and ever since has engaged in extensive air carrier service, scheduled and otherwise, under the name of American Airlines; its predecessor had also operated extensively as an air carrier under the name "American Airways" for four years prior to the incorporation of the petitioner (R. 220). In the words of the respondent's counsel, petitioner is considered "by a great part of the traveling public probably the top airline, the best known airline, in the United States" (R. 83).

The respondent is a North Carolina corporation, but its principal office is in California (R. 1). It engages in air transportation as a large irregular carrier under the authority of a Letter of Registration issued to it by the Civil Aeronautics Board pursuant to Section 416 of that Act (R. 3-4). At the time of the issuance of the Letter of Registration, respondent's corporate name was Twentieth Century Airlines, Inc. and the

^{*} Pages 1 through 317 of the Record consist of the Joint Appendix below which had the same pagination.

Letter of Registration was issued to it in that name (R. 3-4). Without making any effort to change its registered name and without notifying the Board in any manner, the respondent on April 21, 1951 began offering air transportation services to the public under the fictitious name of North American Airlines (R. 220, 309). Thereafter, on May 21, 1951 the respondent filed in the office of the County Clerk of the County of Los Angeles, California, a certificate of conducting business under the fictitious name of North American Airlines, and on March 3, 1952 it amended its articles of incorporation so as to change its corporate name from Twentieth Century Airlines, Inc. to North American Airlines, Inc. (R. 1).

The petitioner and the respondent directly compete on one of the most heavily travelled air routes in the country—Los Angeles-Chicago-New York (R. 220).

On August 19, 1952, the Civil Aeronautics Board adopted its Business Name Regulation, and the section here involved appears as Part 291.28 of the Board's Economic Regulations (R. 295-298; 14 C.F.R. 291.28). The validity of this Regulation has not been challenged. In substance, the Regulation provides that an air carrier, in dealing with the public and in performing air transportation services, must secure permission of the Board to use any name different from the name in its operating authority. In the preamble of the Regulation, however, the Board announced that, where a different name has already been used by a carrier to build up goodwill, such name will be barred only if its use is found after notice and hearing to contravene Section 411 of the Civil Aeronautics Act.*

*The full text of the regulation and the prefatory statement is printed at pp. 295-298 of the Record. This regulation appears in

Pursuant to this Regulation, the respondent applied to the Civil Aeronautics Board on October 6, 1952 for permission to use the name North American Airlines, Inc., (R. 1) and the proceeding on the application was assigned Docket No. 5774 (R. 3).

The petitioner thereupon objected to the grant of the application in Docket No. 5774, and complained that the use and advertising of the name North American Airlines caused the public to confuse the identity of the respondent with that of the petitioner and constituted an unfair or deceptive practice or unfair method of competition in violation of Section 411 of the Civil Aeronautics Act (R. 5).

The Civil Aeronautics Board in a single order set for hearing before an Examiner respondent's application to change its registered name, Docket No. 5774; assigned Docket No. 5928 to a proceeding under Section 411 of the Act in response to the petitioner's objection and complaint that use of the name North American Airlines was in violation of that section; and consolidated the proceeding in Docket No. 5774 with the proceeding in Docket No. 5928 for hearing before the same Examiner (R. 3-5). In another order the petitioner, as the complainant, was permitted to intervene and become a party to support the allegations in its complaint to the Board (R. 6-7).

14 C.F.R. § 291.28, but there the prefatory statement has been omitted. It should also be noted that several regulations—substantively identical—were adopted simultaneously, each regulation being applicable to a different type of carrier in accordance with their different types of operating authority. Thus, one regulation was applicable to carriers holding certificates of convenience and necessity (14 C.F.R. § 202.8), whereas another regulation was applicable to the large irregular carriers holding letters of registration (14 C.F.R. § 291.28).

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The only issue in this consolidated proceeding was whether the respondent's use of and advertising itself under the name North American Airlines, Inc., (or "North American") was an unfair or deceptive practice or an unfair method of competition within the purview of Section 411 (R. 210, n. 10).

At the hearing before a Civil Aeronautics Board Examiner in the consolidated proceeding, both the petitioner (R. 221) and the respondent (R. 223) introduced evidence. Sixteen witnesses testified and numerous exhibits were received in evidence. In due course the Examiner issued an exhaustive Initial Decision finding that the respondent's use of the North American name violated Section 411 (R. 184-199). The respondent filed elaborate exceptions with the Civil Aeronautics Board, and after the normal procedure of briefing and oral argument (R. 200) the Board issued its decision accompanied by an opinion (R. 199-229) in which it specifically adopted numerous of the findings made by the Examiner and entered additional findings and conclusions of its own, on the basis of which it entered a cease and desist order against the respondent under Section 411 (R. 229-230).

FINDINGS AND DECISION OF THE CIVIL AERONAUTICS BOARD

On the evidence the Board found that the public confused the respondent with the petitioner because of the respondent's use of the names North American and North American Airlines and their similarity to the names commonly understood to refer to the petitioner, i.e., American and American Airlines (R. 201).*

* Both before the Board and before the lower court the respondent argued that the words "American" and "American Airlines" have not acquired a secondary meaning signifying the petitioner.

This confusion existed not only among passengers and persons inquiring for flight information, but even among merchants and creditors (R. 201-202)—though “The bulk of the confusion shown in the record was on the part of persons reasonably identified as prospective or actual purchasers of air transportation” (R. 202).

Likewise, the Board squarely rejected the respondent's contention that the confusion was not “substantial or widespread” (R. 204-205). While the Board found it unnecessary to endorse the Examiner's numerical estimate that the instances of confusion in the Los Angeles area alone amounted to some 200 a week, its analysis of the evidence showed that the confusion was, indeed, substantial in amount and was not *de minimis* as the respondent had contended (R. 205-206).

The nature of this widespread confusion was found by the Examiner, in findings adopted by the Board, as follows:

“The above evidence generally involved numerous inquiries on the part of the public made to American employees concerning service, rates, routes, and schedules of North American under the mistaken impression that North American and American were one and the same airline.

“An officer of American testified that he had received from employees under his supervision numerous inquiries indicating confusion between

The lower court's opinion does not adopt the respondent's view, and the Board's findings of fact are quite conclusive:

“There is no doubt that the word American, used in connection with domestic air transportation, is widely known as meaning the [petitioner] . . . and that the phrase American Airlines is also understood to refer to [petitioner] . . . and not to denote the airlines of this nation or continent generally.” (R. 207)

American Airlines and North American Airlines, and that * * * his office had received a telephone call from a representative of a trade union, complaining that an American sign was being painted by non-union painters, and upon investigation it was found that the sign was that of North American. There were instances of air passengers holding North American tickets attempting to check in for North American flights at American ticket counters—in fact, at the Burbank office this was a daily occurrence—and many of the passengers were still confused after an explanation had been made that American and North American were two different airlines. There were instances where North American passengers attempted to claim their baggage at the American counter; also other instances where prospective passengers insisted they were entitled to a discount for transportation on American because they held a 'Buyers League Scrip Book.' Upon an investigation by the passengers making the inquiries, it was learned that it was North American instead of American which offered a discount.

"There were other instances of persons meeting incoming North American passengers who made inquiries at the American ticket counter at Burbank to determine time of arrival. Other inquiries were made of American agents at Los Angeles concerning an \$80 fare from Los Angeles to New York, which the persons had heard advertised on television, and upon investigation it was found that it was North American they were referring to and not American. One witness testified that she had heard people state that they were under the impression that North American and American were the same or affiliated companies. Another witness for American testified that one person insisted that American flew from New York to Miami because she had heard a radio program to that effect, whereas the program in question was that of North

American. There were instances where mail addressed to North American was delivered to American Airlines' office. Tradesmen have dunned American for bills owed by North American and hotels have requested American's advice as to billing for hotel charges incurred by North American crews. A witness for American stated that at its Burbank office the president of North American, who is on duty at the North American ticket counter at Lockheed air terminal, informed her that many persons would stop at his counter and request tickets to Dallas, Oklahoma City, or Tulsa, points which North American did not serve, and he would realize that the passengers were confused and that they were under the impression it was American's ticket counter. *The president further stated to the witness that if the passengers were destined to New York or Chicago he would do everything he could to 'steal' them.*

"There were many other instances similar to those referred to above that need not be repeated here. In general, they indicate that certain confusion exists on the part of the public in distinguishing the services of the two airlines in question." (R. 221-223) (Emphasis added)

The respondent had also argued to the Board that there was no showing of actual fraudulent intent in the adoption of the North American name. The Board made no specific finding that there was such intent, but did find that the name was adopted when "American Airlines was universally known in air transportation", and that the use of a similar name was "not accidental or inadvertent, but rather was knowing." (R. 207). It was also found that the respondent's own evidence showed that it advertised itself as "one of the nation's four great airlines" which was not "even close to being true of respondent", whereas American

"is in fact one of the four largest domestic air carriers, a group commonly referred to as the 'Big Four.'" (R. 207, 208 n. 8.)

Finally the Board found:

"... the record is convincing that the public interest requires this action in order to prevent further public confusion between Respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passengers or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser had anticipated (e.g., in terms of equipment), even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown on the record by eliminating what we find to be the cause of such confusion." (R. 208-209)

The Board concluded, as had its Examiner, that the respondent's use of the name "North American Air-

lines", "North American" or any combination of the word "American" constitutes an unfair or deceptive practice and an unfair method of competition (R. 210-211). Accordingly, it determined that the respondent and its agents should be ordered to cease and desist from engaging in air transportation under such names (R. 210-211), and an appropriate order was entered (R. 229-230).

One of the five Board members dissented, with a dissenting opinion (R. 211-218).

THE OPINION AND DECISION OF THE LOWER COURT

The respondent duly petitioned the lower court to review the Board's order. The petitioner intervened (R. 311).

The issues on the appeal were precisely defined by prehearing stipulation approved by the court (R. 306-311). Those issues, it was agreed, were limited to the following:

1. Did any combination of the Board's findings "establish a violation of Section 411, because of the use by the [respondent] of the name North American Airlines, Inc., North American Airlines or North American"?
2. Did the Board's findings "establish a secondary meaning connoting American Airlines, Inc., in the words 'American' and 'American Airlines' "?
3. Did the Board find that the respondent's use of the North American name was fraudulent?

The only other issues set forth in the agreed statement related to questions as to whether various of the find-

ings as to the existence of confusion, its probability, etc., were supported by substantial evidence.*

The lower court's opinion did not overturn the Board's findings of fact. On the contrary, it quoted some of the findings and paraphrased others, and referred in summary form to a part of the evidence. The defect it found in the Board's decision was, as respondent had contended, that findings essential to a Section 411 case had not been made.

The opinion below consists of five separately numbered sections. In Section I—which concludes that the “error of the Board stems” from the failure to make “findings demanded by the law” (R. 418; *infra* p. vii)—there is set forth the nature of the missing findings which the court regarded as essential. The discussion begins with a quotation of a statement made by the Examiner in his Initial Decision:

“There is no evidence of record that North American adopted its name with *intent to deceive* the public or trade upon the good-will and business reputation of American, or that *American has been injured* by such operation . . .” (Emphasis added) (R. 417; *infra*; p. vi)

The court's opinion then says that its examination of the evidence shows that the Examiner's negative find-

* It will be observed that on the appeal no issue was tendered bearing on the scope of the Board's order or its appropriateness as a means for remedying the Section 411 violation if such a violation were properly found to exist. Hence the problem dealt with in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 612-613 (1946), as to whether some alternative form of order should have been entered, is not involved in this case. See also, *Federal Trade Commission v. Milling Co.*, 288 U.S. 212, 217-218 (1933).

ing was correct.* It also says that there was no evidence that the respondent had "palmed itself off"; or that the respondent had derived advantage from the confusion of passengers; or that, by its advertising, respondent had "enticed" American's passengers to fly North American; or that respondent had flown a single passenger who thought that he had contracted for something other than respondent's transportation (R. 417-418; *infra*, p. vi). Accordingly, "there is no demonstration that North American affirmatively acted in violation of a statute, within the jurisdiction of the Board" (R. 418; *infra*, p. vii).

Subsequent sections of the opinion leave it unclear whether findings of deliberate intent to deceive and of injury to a competitor are regarded as essential under the "public interest" language of Section 411 or are required as part of the substantive offense of "unfair or deceptive practices or unfair methods of competition."

Section II of the opinion notes that the legislative history of the Act shows that the public interest was to be the guiding consideration and that Section 411 was adapted from Section 5 of the Federal Trade Commission Act (R. 419-422; *infra* pp. vii-x). And in the first paragraph of Section III, the opinion proceeds on the public interest theme by quoting *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929), to the effect that confusion on the part of purchasers is not enough to establish a Section 5 case but that the purpose of such a proceeding "must be protection of the public." (R. 423; *infra* p. xi)

* The Board did not include this negative finding among those adopted by it.

The remainder of Section III, however, appears to be concerned primarily with the substantive content of "unfair methods of competition". It quotes the dictum from *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427-428 (1920), that the statutory "words 'unfair methods of competition' . . . are clearly inapplicable to practices never heretofore regarded as . . . deception, bad faith, fraud or oppression" (R. 423; *infra* p. xi) But thereafter Section III of the opinion seems to telescope into a single concept the separate statutory points on "public interest" and "unfair or deceptive practices or unfair methods of competition", relying on *Schechter Corp. v. United States*, 295 U.S. 495, 533 (1935), and *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 648 (1931) (R. 423-424; *infra* pp. xi-xii).

Section IV of the opinion sets forth at considerable length what it says is a "collateral discussion" (R. 428; *infra* p. xv) of numerous cases dealing with the private law of trade name infringement (R. 424-430; *infra* pp. xii-xvi) and asserts that the Board was not constituted to adjudicate such "complicated issues" (R. 429; *infra* p. xvi). Significantly the opinion adds that the court would "not say that under no circumstances can name appropriation in simulation of or in general resemblance to the name of another airline result in an unfair trade practice or an unfair method of competition, quite the contrary" (R. 429; *infra* p. xvi). To this statement there is appended a footnote citing four private name infringement cases, each of which involved fraudulent intent on the part of the defendant.* The conclusion in Section IV of the opin-

* The cases cited are: *Aetna Casualty & Surety Co. v. Aetna Auto Finance*, 123 F.2d 582, 584 (5th Cir. 1941) ("here it plainly,

ion is that the mere combination of the words "North" and "American" is not a case within the Board's "jurisdiction" (R. 429-430; *infra* p. xvi).

Finally the opinion asserts in Section V. the rule that protection of a name is beyond the scope of the Board's powers (R. 432; *infra* p. xviii). The opinion states that it is "reinforced" in this conclusion by a review of the "leading cases" of this Court dealing with Section 5 of the Federal Trade Commission Act, which it summarizes in an Appendix to the opinion. Many of these cases have no remote bearing on the instant case.* However, very significantly the *Klesner* case is summarized as follows:

"... refused enforcement where *mere confusion in competing business names* failed to establish 'specific and substantial' public interest." (R. 433; *infra* p. xix) (Emphasis added)

Also meaningful is the summary of *Federal Trade Commission v. A. P. W. Paper Co.*, 328 U.S. 193 (1946), in these terms:

appears that [the name is] . . . fraudulent and will be enjoined"); *Greyhound Corp. v. Goberna*, 428 F.2d 806, 807-808 (5th Cir. 1942) ("Choice of the name 'Greyhound' . . . was . . . fraudulent"); *Standard Oil Co. of Maine v. Standard Oil Co. of New York*, 45 F.2d 309, 312 (1st Cir. 1930) ("[The name] shows a premeditated plan . . . with but an obvious and sinister purpose in view"); *Standard Oil Co. of New Mexico v. Standard Oil Co. of Calif.*, 56 F.2d 973, 980 (10th Cir. 1932) ("It could have had but one object, namely, to improperly obtain . . . the name 'Standard Oil' and to take and commercially use as its own a commercial asset that belongs to another").

* *E.g.*, *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 39 (1948); *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952), and other cases under the Robinson-Patman Act involving issues wholly unrelated to the case at bar.

"... refused enforcement of a Commission order forbidding the use of 'Red Cross' in advertising *where there was no fraud* but where some of the public thought that goods were made in accordance with standards of, or by virtue of some connection with, the American Red Cross." (R. 434-435; *infra* p. xxi) (Emphasis added)

And *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931), is summarized as follows:

"... denied enforcement of an order against a dangerously misleading obesity 'cure' where there was a failure of demonstration that advertising 'substantially injured or tended thus to injure the business of any competitor or of competitors generally'" (R. 433; *infra* p. xix)

In sum, then, the lower court held that, in a name confusion case, there is no unfair practice or unfair method of competition "over which the Board, in the public interest, has jurisdiction" (R. 430, *infra* p. xvi) unless there is shown (a) deliberate intent to deceive amounting to fraud and success in "palming off" by deception, and (b) actual injury to a competitor in the form of loss of patronage resulting from "enticement" of confused customers. Absent these factors, the court's ruling is that confusion of the public by name similarity is a matter only of private concern quite beyond the power of the Civil Aeronautics Board to remedy.

REASONS FOR GRANTING THE WRIT

1. The court below, in holding that a case of statutory unfair practice and unfair method of competition requires a showing of deliberate intent to deceive which is carried out through "palming off" by deception, is in conflict with decisions of Courts of

Appeals for the Third, Seventh and Second Circuits under Section 5 of the Federal Trade Commission Act, the substance of which is the same as that of Section 411 of the Civil Aeronautics Act. The lower court specifically ruled that it was applying its view of Section 5 of the Trade Commission Act (R. 432; *infra* p. xviii).

The Court of Appeals for the Third Circuit in the leading case of trade-name confusion under Section 5 of the Trade Commission Act, has squarely held that a "deliberate effort to deceive is not necessary, nor must the Commission find actual deception. . . ." *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F. 2d 158, 161 (3d Cir. 1941). Similarly, the Seventh Circuit has held "that the false, unfair or deceptive acts defined in the Federal Trade Commission Act need not be such as would constitute fraud, as that term is ordinarily understood in law." *DDD Corp. v. Federal Trade Commission*, 125 F.2d 679, 682 (7th Cir. 1942). And in the Second Circuit, the failure of the Commission to "produce consumers to testify to their deception does not make the order improper, since actual deception of the public need not be shown" *Charles of the Ritz v. Federal Trade Commission*, 143 F. 2d 676, 680 (2d Cir. 1944). See also, *Gimbel Bros. v. Federal Trade Commission*, 116 F. 2d 578, 579 (2d Cir. 1941) ("a deliberate effort to deceive is not necessary").*

*Several other courts have applied the same rule in common law cases of unfair competition, especially where only equitable relief in the future is requested. *Navy Club v. All Navy Club*, 85 F. Supp. 679, 682 (D.R.I. 1949); *Household Finance Corp. v. General Finance Credit Corp.*, 49 F. Supp. 541, 542 (D.N.J. 1943); cf. *Stork Restaurant v. Sahafi*, 166 F.2d 348, 359 (9th Cir. 1948).

In short, in these three circuits the controlling consideration is the probability that the public may be misled, not a showing of deliberate intent to deceive amounting to fraud—and not a showing of palming off by deception in the conventional sense of common law unfair competition.

The lower court establishes contrary doctrine for the District of Columbia Circuit by a revival of an old dictum in *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427-428 (1920), to the effect that the statutory unfair method of competition is limited to cases of fraud, deception, and bad faith in business ethics as understood prior to 1914 (R. 423; *infra* p. xi). It has been thought by some students, Handler, *Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399, 404 (1940), and by some judges, see *Koch v. Federal Trade Commission*, 206 F. 2d 311, 319 (6th Cir. 1953); cf. *Charles of the Ritz v. Federal Trade Commission*, 143 F. 2d 676, 680 (2d Cir. 1944), that this dictum had been interred by this Court through Mr. Justice Cardozo in *Federal Trade Commission v. Algoma Co.*, 291 U.S. 67, 81 (1934), where it was said that competition may fall within the statutory ban though it “does not amount to fraud as understood in courts of law”, and through Mr. Justice Stone in *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304, 309 (1934), where the Court expressly rejected the argument that a showing of fraud or accomplished deception is a prerequisite to a finding of an unfair method of competition.

However, never expressly overruled, the *Gratz* dictum lives again in the District of Columbia and

seriously confuses the law.* Review by this Court is clearly indicated.

2. The lower court has introduced another anachronistic rule into the law of statutory unfair practices and unfair methods of competition. It held that a showing of injury to a competitor is required to establish a violation of the statute.

Other circuits have taken a contrary position and conflict exists. Faced with the argument "that the order should be set aside because no competitor was hurt by the practices", the Seventh Circuit rejected the contention as "hardly worthy of serious or extended consideration." *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.2d 321, 327 (7th Cir. 1944). The rule in the Third Circuit is the same. *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F.2d 158, 161 (3d Cir. 1941).

The lower court has reintroduced the rationale of *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931), which first established the rule that competitive injury was essential under Section 5 of the Federal Trade Commission Act as that Act was worded prior to 1938. But Congress supposedly legislated that decision out of the law by the Wheeler-Lea Amend-

* For signs of confusion elsewhere, see *New American Library v. Federal Trade Commission*, 213 F.2d 143 (2d Cir. 1954), where one judge would have reversed the Commission's order on the ground that no violation of the statute is shown unless there is evidence of actual deception of customers (213 F.2d at 145, n. 2). His authority was *Ohio Leather Co. v. Federal Trade Commission*, 45 F.2d 39, 41 (6th Cir. 1930), a case decided on the authority of the *Gratz* opinion. Compare *Hillman Periodicals v. Federal Trade Commission*, 174 F.2d 122 (2d Cir. 1949).

ment to the Trade Commission Act in 1938.* The Wheeler-Lea Amendment and the Civil Aeronautics Act were enacted almost simultaneously, and the substance of the former was included in the language of Section 411 of the latter.**

But in the present case the lower court not only cites and relies on the *Raladam* case, and summarizes it in the appendix to the opinion as though it remained in full force (see the court's summary quoted *supra* pp. 17-18), but makes a point of emphasizing, as grounds for its decision, the absence of a showing of injury to the competitor, the petitioner here (R. 418; see discussion *supra* p. 14). This notable resurrection of the *Raladam* case is accomplished by reasoning that an order to cease and desist under Section 411 of the Civil Aeronautics Act must be in the public interest, and concluding that if the respondent had not succeeded in taking business from its competitor the public had not been harmed—ignoring the fact that the public was put to expense, annoyance, and delay by going to the wrong ticket counter, telephoning the wrong carrier, meeting the wrong flights, and suffering the many other confusing impositions specifically disclosed by the Board's findings.

This requirement of a specific showing that competitive injury has been accomplished, in order to dem-

* See Beer, *Federal Trade Law and Practice* 79 (1942). The legislative history singled out the *Raladam* ruling and explicitly indicated that it was being overturned. S. Rep. No. 221, 75th Cong. 1st Sess., p. 2 (1937).

** The prohibition in Section 411 of "unfair or deceptive practices" follows the same pattern as the new language added to Section 5 of the Trade Commission Act in 1938 which outlawed "unfair or deceptive acts or practices."

onstrate that there is a "public interest" in the proceeding, defeats the plain purpose of the Wheeler-Lea Amendment, incorporated in Section 411 of the Civil Aeronautics Act. Review by this Court is called for.

3. Having revived the *Gratz* dictum and the *Raladam* ruling, the court below proceeds to apply the third landmark opinion that was issued during a period in which, according to many critics,* this Court was excessively severe in overturning Trade Commission orders. This third opinion is *Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929).

In the *Klesner* case the facts disclosed that in 1915 the respondent, as a matter of spite, opened a small store in Washington, D. C., and used the name employed by his former lessee who thereafter became his competitor, with whom he had a wide range of disputes. By the time the Commission entered its order some seven years later in 1922, a private suit by the complaining party, requesting an injunction against the former lessor's use of his trade name, had previously been dismissed in 1920, and this Court emphasized that the notoriety of the petty and spiteful dispute extending over a period of several years had dispelled any public confusion that might have initially existed in the small area where the two stores operated. 280 U.S. at 29. Thus the matter had become a triviality, and the Commission's order would settle only a vendetta in which no public interest remained. In this setting, the Supreme Court reversed the Commission's order, "not on the merits, but upon the ground that

* Blaisdell, *The Federal Trade Commission* 74 (1932); Watkins, *Appraisal of the Work of the Federal Trade Commission*, 32 Col. L. Rev. 272 (1932).

the filing of the complaint before the Commission was not in the public interest.” 280 U.S. at 24.

Nonetheless there are some passages in the *Klesner* opinion which, taken out of context, might suggest that this Court meant that customer confusion in name similarity cases, however widespread, could not be a basis for Commission action under Section 5 of the Trade Commission Act. And it was exactly this interpretation which the lower court gave to the case. The opinion below quotes from the case (R. 422-423, *infra* pp. x-xi) and summarizes it as one which “refused enforcement where mere confusion in competing business names failed to establish ‘specific and substantial’ public interest” (R. 433; *infra* p. xix; see discussion *supra* p. 15). After the lower court had noted that the instant case likewise involves only public confusion resulting from competing business names, it held that—absent fraudulent intent to deceive and palming off by deception—the Board has no “jurisdiction” of such a case (R. 430; *infra* p. xvi).

This ruling that the Board has no “jurisdiction” over name confusion cases conflicts with law developed under the Trade Commission Act.*

* *Cf. Galter v. Federal Trade Commission*, 186 F.2d 810 (7th Cir. 1951), *cert. denied*, 342 U.S. 818 (1951); *Pep Boys—Manny, Moe and Jack v. Federal Trade Commission*, 122 F.2d 158 (3d Cir. 1941); *Federal Trade Commission v. Real Products Corp.*, 90 F.2d 617 (2d Cir. 1937). Moreover, the suggestion in the opinion below (R. 429, *infra* p. xvi) that Congress has no legislative power in this area of trade-name confusion is erroneous, see *S. C. Johnson & Son v. Johnson*, 175 F.2d 176, 178 (2d Cir. 1949), and clearly conflicts with, and therefore casts doubt on, the incontestability clause in Section 15 of the Lanham Trade-mark Act, 60 Stat. 433 (1946), 15 U.S.C. § 1065.

The lower court, in applying the *Klesner* decision to deny Board jurisdiction, not only ignores the facts in the *Klesner* case, as well as the most significant passages in this Court's opinion, but also conflicts sharply with the interpretation of the same case held by Judge Learned Hand:

"*Klesner* . . . did indeed decide that the public interest in the controversy was a justiciable issue The dispute concerned the use of a trademark which the respondent *Klesner* had adopted out of spite against its owner, *Sammons*; and the discussion left it not altogether clear why the public had no interest in its settlement. One might perhaps infer that if the only interest at stake is that customers shall get goods from the seller of whom they supposed they are buying, it is not enough . . . but it seems clear from what the court has said later that this is not so [citing the *Royal Milling* and the *Algonquin* cases] It would seem, therefore, that *Federal Trade Commission v. Klesner* . . . is to be put down as deciding that the court may consider whether the controversy is not in general too trivial to justify the attention of the Commission. If so, it is doubtful whether today the same answer would be given." *Mortrench Corp. v. Federal Trade Commission*, 127 F.2d 792, 795 (1942).

Judge Hand's view of what the *Klesner* case held is that generally entertained. *Handler, Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399, 404 (1940). That view would not outlaw, as not in the public interest, an order to cease and desist from a practice affecting the public extensively in its air travel between Los Angeles and New York.

This Court alone can dispel the confusion as to the meaning of the *Klesner* case and its present vitality.

if any. As Judge Hand says, it may well be that the public interest issue would not now be regarded as justiciable, or at least not to the extent which this Court apparently determined in 1929. And even if the case remains vital for purposes of Section 5 of the Trade Commission Act, there is a serious question whether it should be applied at all—or if so, how far—in judicial review of administrative action in the context of a special regulatory statute such as the Civil Aeronautics Act, where the agency is charged with a peculiar responsibility and expertise with respect to the practices of a particular industry.

Mr. Justice Frankfurter has recently noted* that the significance of judicial review of Section 5 Trade Commission orders is highlighted “by the dissimilar treatment of comparable standards entrusted to the enforcement of the Interstate Commerce Commission.” Although the outer limits of “unfair or deceptive practices or unfair methods of competition” may be determined by the courts, the findings of the Civil Aeronautics Board in a statutory unfair practice case in the highly specialized field of air transportation are entitled to considerably more weight than similar findings in an ordinary Trade Commission case. See *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 488 (1951). And the scope of judicial review of the Board’s determination to institute a Section 411 proceeding in the “public interest” should be even more limited. Compare this Court’s recent observation that judicial review of the decision of the General Counsel to institute an “unfair labor practice” proceeding before the National Labor Relations

* *Federal Trade Commission v. Motion Picture Adv. Co.*, 344 U.S. 392, 404 (1953) (dissenting opinion).

Board is limited to determine whether there was "abuse of discretion." *Radio Officers v. Labor Board*, 347 U.S. 17, 53 (1954).

Clarification by this Court of the present application of the *Klesner* case is urgently needed.

4. The paramount importance of the questions presented can hardly be denied. This is the first case ever to reach the courts involving Section 411 of the Civil Aeronautics Act. That section can be of great importance in the regulation of the practices of a large, rapidly expanding, and highly competitive industry. In 1938, when the Act was passed, air transportation was conducted only by some sixteen trunk lines, many of them very small, and with direct competition on but a handful of segments. Since the war, however, the domestic trunklines have grown to great size, directly competing throughout the nation—with as many as five trunk carriers competing between the same pairs of points. In addition there are some thirteen local service lines, many of which are larger than some of the trunk carriers in 1938. Further there are over fifty large irregular or non-scheduled carriers, three all-cargo carriers, several helicopter lines, and literally innumerable small non-scheduled lines and air "taxi" operators. Furthermore numerous new air carrier operations have appeared in the Territories. And internationally there has been similar expansion, with the carriers of nearly every important nation outside the iron curtain operating to these shores, whereas before the war there were only two or three, and with our own international services having multiplied from practically only one to many. To all of these services, with their keen and vigorous competition, and to the vast public they are serving, Section 411^b will be of the greatest significance unless it is emasculated.

It is now recorded history that the Trade Commission, for more than a decade, was nearly stopped in its tracks in attempting to enforce Section 5 of its basic Act outlawing unfair methods of competition. This was accomplished principally by three opinions of this Court in the *Gratz*, *Raladam* and *Klesner* cases, the very opinions taken as gospel by the lower court. As outlined by Professor Handler:

"The story of the judicial frustration of the Commission's efforts to set a plane of competition at a decent level has been . . . frequently told. . . . In the famous *Gratz* case . . . the Court in its oft-quoted dictum limited the authority of the Commission to (a) restraints of trade, (b) monopoly, and (c) practices which prior to 1914 had been regarded as deceptive, fraudulent or oppressive

"The *Gratz* case was not the only blow. . . . In . . . *Klesner* the Supreme Court arrogated to itself the determination of whether proceedings by the Commission were in the public interest, and in doing so, gave jurisdictional effect to directional language of the statute. In . . . *Raladam* . . . the power of the Commission . . . was limited to the cases where injury is sustained by an honest competitor. . . .

"Recent years have witnessed a marked improvement . . . and much of the mischief wrought by the earlier unsympathetic and hostile rulings has been and is being undone. . . .

* * *

"There have been significant doctrinal changes. The *ratio decidendi* of the *Gratz* case has in effect been overruled by *Federal Trade Commission v. Keppel*. The *Raladam* case was overturned by the Wheeler-Lea Amendments. The *Klesner* case still retains its vitality, but its principal effect has been to exclude from the Commission's jurisdiction minor peccadillos." *Unfair Competition and the Federal Trade Commission*, 8 Geo. Wash. L. Rev. 399, 400-402, 404 (1940).

It is most disturbing that, in the first judicial interpretation of Section 411 of the Civil Aeronautics Act, it should receive the same frosty reception and rigid construction which for years stymied enforcement of the companion statutory provision in Section 5 of the Trade Commission Act. This comment seems particularly apt in the instant case where—unlike the early Trade Commission cases—the Board and the Examiner both wrote illuminating opinions and made elaborate findings as to the difficulties and impositions caused the public by the name confusion in question.

The opinion below could well side-track Section 411 of the Civil Aeronautics Act much more effectively than *Gratz*, *Raladam* and *Klesner* impeded Section 5 of the Trade Commission Act. Section 411 of the Civil Aeronautics Act is of relatively less concern to the Civil Aeronautics Board, with its many other regulatory duties, than is Section 5 to the Trade Commission. It does not have the same incentive, as had the Trade Commission during its long, uphill struggle, to resist such undue judicial restriction.

The effect of the decision below, moreover, extends beyond the air transportation industry. As we have seen, the court below specifically held that, in construing Section 411 of the Civil Aeronautics Act, it was applying its views of Section 5 of the Trade Commission Act, thus reaffirming in the District of Columbia Circuit a set of rules which one would have thought completely discredited if not forgotten.

The decision will likewise be an important precedent in dealing with other statutory provisions prohibiting "unfair" practices in specialized fields. For example, an almost identical twin of Section 411 of the Civil Aeronautics Act may be found in Section

337 of the Tariff Act.* It is designed to prevent "unfair methods of competition and unfair acts in the importation of articles into the United States", and authorizes the Tariff Commission to institute a proceeding "on complaint under oath or upon its own initiative."

Other statutory provisions in this area include Section 202 of the Packers and Stockyards Act which makes it "unlawful for any packer . . . to (a) engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce."** Finally, the Trade Commission has jurisdiction under Section 14 of the Webb Export Act to prohibit "unfair methods of competition used in export trade."***

It is vitally important that the District of Columbia Circuit, having special responsibilities in the field of administrative law, should be brought into harmony with other Circuits and have the guidance of this Court on the present application of some of its old and rather musty precedents.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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* 46 Stat. 703 (1930), 19 U.S.C.A. § 1337.

** 42 Stat. 161 (1921), as amended, 49 Stat. 649 (1935), 7 U.S.C.A. § 192(a).

*** 40 Stat. 507 (1918), 15 U.S.C.A. § 64.